

NORMA BURCIAGA
Claimant

RECREATION VEHICLE PRODUCTS
Respondent

SECURITY INS. CO. OF HARTFORD
Insurance Carrier

This is an appeal from the Administrative Law Judge's Order assessing penalties of \$400 against the respondent for failure to pay temporary total disability compensation in a timely manner.

The sole issue raised on review by respondent is whether the Administrative Law Judge erred in assessing a penalty against respondent for its failure to pay temporary total disability compensation. Respondent does not dispute that it failed to timely pay compensation, but contends the claimant's statutory demand letter, pursuant to K.S.A. 44-512a, was premature because when the demand letter was sent claimant had not been taken off work and was not entitled to temporary total disability compensation. Respondent also contends that compensation is not due until an award becomes final. Therefore claimant cannot invoke the penalty provisions of K.S.A. 44-512a before the final award has been entered.

The claimant's brief raises the issue of whether the Board has jurisdiction to consider the respondent's request for review. Claimant notes the Administrative Law Judge did not exceed his jurisdiction and accordingly neither K.S.A. 44-551(b)(2)(A) nor K.S.A. 44-534(a)(2) confers jurisdiction for the Board to consider this review. Claimant further contends that temporary total disability compensation was awarded and to deny penalties would encourage respondent to ignore the order and result in additional delay in the delivery of claimant's benefits.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the evidentiary record compiled to date and the briefs of the parties, the Board makes the following findings of fact and conclusions of law:

A preliminary hearing was held in this case on November 7, 2000. The Administrative Law issued an Order on that date which authorized Pedro Murati, M.D., to provide treatment to the claimant and further stated: "Temporary total disability in the event the Claimant is taken off work."

On November 8, 2000, claimant sent a 20-day demand letter by certified mail to respondent's insurance carrier. The demand requested: "Payment of temporary total disability if claimant is taken off work." A copy of the Administrative Law Judge's November 7, 2000, Order was enclosed.

The claimant began treatment with Dr. Murati, who later referred the claimant to Dr. James L. Gluck. On April 17, 2001, Dr. Gluck performed right carpal tunnel surgery. A copy of Dr. Gluck's work status report dated April 17, 2001, was proffered as an exhibit at the penalties hearing. The work status report indicated claimant was taken off work from April 17, 2001, through April 23, 2001, and further restricted claimant from the use of her right hand.

On April 27, 2001, claimant's counsel sent respondent's counsel a letter by regular mail requesting payment of temporary total disability benefits and enclosed copies of Dr. Gluck's work status report and surgery discharge instructions.

According to statements made by claimant's attorney at the penalty hearing on June 21, 2001, the respondent paid temporary total disability compensation for the period of April 23rd through April 29th on May 3, 2001. No additional temporary total disability compensation was paid. On May 21, 2001, the claimant filed an Application for Penalties with the Division of Workers Compensation seeking penalties for failure to pay temporary total disability compensation. On May 24, 2001, the respondent paid claimant a lump sum for the temporary total disability compensation for the week of April 16th through April 22nd and for the weeks of April 30, 2001 through May 20, 2001.

A penalty hearing was held on June 21, 2001, and the Administrative Law Judge in an Order dated June 28, 2001, assessed a \$400 penalty against respondent for failure to pay the temporary total disability compensation in a timely manner. The Administrative Law Judge's Order does not specify which temporary total disability payments were due and unpaid, nor how the \$400 penalty amount was computed.

Initially, claimant raises the issue of whether the Board has jurisdiction to consider the respondent's request for review of the Order assessing penalties. The claimant cites statutes limiting the jurisdiction of the Board in consideration of appeals from preliminary awards. An award of penalties, however, is not a preliminary award pursuant to K.S.A. 44-534a and is treated the same as a final award. *Waln v. Clarkson Constr. Co.*, 18 Kan. App. 2d 729, 861 P.2d 1355 (1993). Therefore, the Board does have jurisdiction to decide this matter.

The respondent contends the statutory demand letter was premature because when it was sent there was no temporary total disability compensation due and unpaid. K.S.A. 44-512a states in pertinent part:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due . . . if: (1) Service of written demand for payment, **setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due**, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand. (Emphasis added).

In *Stout v. Stixon Petroleum*, 17 Kan. App. 2d 195, 836 P.2d 1185, *rev. denied* 251 Kan. 942 (1992), the Court noted:

Before a penalty may be imposed, the statute essentially requires (1) an award of compensation which is due and payable, but has not been paid, (2) service of a written demand for payment, and (3) the passage of 20 days from the service of demand without payment of the compensation due. 17 Kan. App. 2d 198.

At the time claimant served its K.S.A. 44-512a demand letter on respondent, there were no amounts of temporary total disability compensation which could be deemed unpaid and past due. The preliminary Order made payment of temporary total disability compensation contingent upon the claimant being taken off work. The demand letter was sent on November 8, 2000, and claimant was not taken off work until April 17, 2001. In *Hallmark v. Dalton Construction Co.*, 206 Kan 159, 476 P.2d 221 (1970) it was stated: "A statutory demand under [K.S.A.] 44-512a can only be effective for compensation awarded the claimant then due and unpaid. (*Damon v. Smith County*, 191 Kan. 564, 382 P.2d 311.)" 206 Kan. at 161.

The Board also finds that the K.S.A. 44-512a demand letter served by claimant on November 8, 2000, lacks the requisite specificity to be enforceable. K.S.A. 44-512(a) provides that the demand must set forth ". . . with particularity the items of disability and medical compensation claimed to be unpaid and past due . . .". The letter at issue in this case demanded "Payment of temporary total disability if claimant is taken off work." The demand letter did not set forth the weeks of temporary total disability compensation claimed to be past due and unpaid. At the time of its service, there were no temporary total disability compensation payments which were payable.

The statute requires the items claimed to be past due be set forth with particularity. This requirement eliminates any issue about whether a respondent knew or should have known what benefits were unpaid and past due. The statutory demand letter sent in this case did not set forth with particularity the items claimed unpaid and past due. The Board is compelled to adhere to and enforce the statute. The demand letter is, therefore, unenforceable and penalties are denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated June 28, 2001, is reversed.

IT IS SO ORDERED.

Dated this _____ day of January 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Terry J. Torline, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director